NO. 20306

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

NEAL CLARK,)
Appellant)
)
vs.) NO. 20306
)
STATE OF WASHINGTON,)
)
WASHINGTON STATE BAR ASSOCIATION,)
Appellees)

Appeal from the United States District Court
for the Western District of Washington,
Northern Division
Honorable W. T. Beeks, Judge

Brief of Appellee Washington State Bar Association

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TABLE OF CASES

STATUTES

RULES

RULES OF PROCEDURE IN DISCIPLINARY PROCEEDINGS

The underscoring throughout this brief is the appellee's.

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vs.

STATE OF WASHINGTON and
WASHINGTON STATE BAR ASSOCIATION,
an agency of state government,
Appellees.

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BRIEF OF APPELLEE WASHINGTON STATE BAR ASSOCIATION

Statement of the Pleadings and Facts

THE PLEADINGS

This is an appeal from an order which dismissed appellant's action for the reason 1) the court lacks jurisdiction over the persons of the appellees and the subject matter of the action, and 2) the complaint fails to state a claim against either defendant upon which relief can be granted. (R.77)

Jurisdiction of the U. S. District Court is asserted by appellant to come from Articles (of amendment) IV, VIII, and XIV of the United States Constitution and from section 1343, title 28, and section 1983, title 42, U.S.C.A. (R. 1)

Appellant's brief does not disclose the basis upon which he contends that this court has jurisdiction to review the order in question. He has not complied with Rule 18, 2 (b) in that particular.

> "18. BRIEFS 1. *****
>
> "2. This (appellant's) brief shall contain, in order here stated-- * * * *
>
> "(b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction to review the judgment, decree or order in question. The statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, **** (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear." 28 U.S.C. Pocket Part, p. 115; 28 F CA, Rules, p. 348.

Appellant's complaint (R. 1-10) states that he was unjustly disbarred by the Supreme Court of Washington in February 1963. In re Clark, 61 Wn 2d 547, 379 Pac. 2d 354; cert. denied 375 U.S. 986, 11 L. ed 2d 473, 84 S. Ct. 519; rehearing denied 376 U.S. 935, 11 L. ed. 2d 655, 84 S. Ct. 698 (1964). His claim is he was denied due process (R. 3, 5-7) in the proceedings which lead to the decision of the

PLEADINGS

Supreme Court, and that his disbarment is cruel and unusual punishment (R. 7), and a denial of the equal protection of the laws. R. 4.

His complaint asks the U. S. District court to vacate the state court's judgment disbarring him from the practice of law, and to grant him an injunction prohibiting appellees from revoking his license to practice law, and to order appellees to restore him to the list of active members of the Washington State Bar Association and to award him judgment for damages at $12,000 a year from the date of his disbarment; or, in the alternative, "defendants' proceedings be set aside and plaintiff be tried in accordance with law." R. 8.

Appellees filed separate motions to dismiss the action on the grounds that the complaint failed to state a claim upon which relief could be granted, and because it appeared upon the face of the complaint the court lacked jurisdiction of the subject matter and of the appellees. R. 11, and 74. After argument and consideration of briefs, the court granted the motion on all the grounds. R. 77.

PLEADINGS

Appellant's complaint sets out the following as being the facts: That the Washington State Bar Association was created by act of the legislature. R. 1, line 12. RCW 2.48.010. (Laws 1933, chap. 94, p. 397) That the Association has authority over the discipline of attorneys. (R. 1 line 12)

That a formal complaint was filed by the Association which charged appellant with three items of professional misconduct. R. 2, lines 3, 23, 25. That a hearing was had before a three member panel. R. 2, lines 5, 30. That the panel made findings adverse to appellant as to the three items and recommended to the Board of Governors that he be disbarred. R. 2, line 30, R. 3, line 1. (Note: this would be a recommendation that the Board itself make such a recommendation to the Supreme Court, for only the Supreme Court has power to disbar. RCW.2.48.060; Laws 1933, ch. 94, sec. 8, p. 399. App. ii; Rule VIII D, 57 Wn 2d lxii, R. 46-47, App. v.)

PLEADINGS

That the Board of Governors on review of the record found that the facts sustained the first two items of complaint. R. 2, lines 1, 2. That the recommendation of the Board to the Supreme Court was that appellant be disbarred on account of the facts of the first two items, and that the third item be dismissed. R. 3, lines 2-6. That the Supreme court concurred in the findings of the Board, and approved the recommendation that the third item be dismissed and that Mr. Clark be disbarred for the misconduct shown in the remaining two items. R. 3, lines 7-8.

Violation of U. S. Constitutional provisions is alleged to consist mostly concerning the item which was dismissed. As to the other two items the violation of the constitution is claimed to be

1) the institution of these items of complaint by a petition and letter from a hostile, opposing attorney (R. 5, line 16)

2) the introduction in evidence of an oral decision made by the trial judge in the civil action involving the acts set out in these two items of complaint (R. 5, lines 19-22)

PLEADINGS

3) there was no prior interview of appellant before the formal disciplinary complaint was filed (R. 5, line 23)

4) there was no pretrial administrative hearing (R. 5, line 26)

5) a finding adverse to appellant was based on evidence given in his defense (R. 5, line 29; R. 6, lines 1-8)

6) there was hostile interrogation of appellant by panel members, so much so that appellant's own counsel was rendered nearly mute (R. 7, lines 1 to 7)

7) there was a failure to recognize appellant's claim to compensation for services rendered (R. 7, lines 8 to 21)

8) the Board refused to receive the testimony of Donna Teal (R. 4, lines 11 to 22; R. 10).

(See also appellant's brief p. 5 and 6)

PLEADINGS

As to the third item, the one that was dismissed, his chief claim is that he was not allowed by either the hearing panel or the Board of Governors to produce Ruth Meacham as a witness. R. 3, lines 10 to 21, R. 4, lines 1 to 9. And as to this third item he also complains his constitutional right was violated because the record as to that item was sent to the Supreme Court, contrary to a rule of discipline. R. 6, lines 21 to 28.

THE RULES OF PROCEDURE IN DISCIPLINARY PROCEEDINGS

Mr. Clark was admitted to the practice of law by the Washington Supreme Court. R. page 1, line 17.

The Washington State Bar Association was created by the Legislature, as a state agency. RCW 2.48.010, Laws 1933, chap. 94, page 397, App. i.

The statute provides that the Association shall be managed by a Board of Governors, one chosen from each Congressional District; there are seven. The Board elects the President, who is also a member of the Board. RCW 2.48.030 and 040, Laws 1933, chap. 94 page 398, App. i.

As is authorized by the statute, RCW 2.48.060, Laws 1933, chap. 94, page 399, the procedure relating to the discipline of attorneys is established by rules of the Supreme Court. 57 Wn 2d xlvi to lxvii, R. 33 to 50. RCW 2.48.060; Laws 1933, chap. 94, sec. 8, page 399, App. ii.

Under these rules, neither the Board of Governors nor any committee has the power or authority to suspend or disbar any attorney. In situations where it is considered that the discipline should be either suspension or disbarment, all they may do is to make recommendation. Rule VIII D, 57 Wn 2d lxii, R. 47, App. v.

All formal disciplinary complaints are heard by a three member panel. The chairman is a member of the Board of Governors who resides in a district different from that of the lawyer concerned. The other members of the panel are lawyers who do reside in his county or district. Rule V, C, 57 Wn 2d li, R. 38, App. iii.

RULES OF PROCEDURE

Testimony at the panel hearings is required to be under oath. Rule VII, I, 57 Wn 2d lvii, R. 43, App. iii. The panel makes findings of fact, conclusions and its recommendation of disposition to the Board of Governors. Rule V, D, 57 Wn 2d lii, R. 39, App. iii.

A copy of the findings, conclusions and recommendation of the panel is required to be served on the respondent lawyer. Rule VIII, A, 57 Wn 2d lxi, R. 45, App. iii. He has 20 days in which to make a statement in support of or in opposition to the panel report. Rule VIII, B, 57 Wn 2d lxi, R. 46, App. iv.

The respondent attorney has the right to request an additional hearing before the panel based on the ground of additional evidence, provided there is furnished a complete outline of such additional evidence and a statement of the reasons why the same was not presented at the hearing, all supported by affidavit. Such request may be granted or denied in the discretion of the Board. Rule VIII, C, 57 Wn 2d lxi, R. 46, App. iv.

RULES OF PROCEDURE

The record is required to be circulated to each member of the Board of Governors. Rule VIII, D (first and last paragraphs), 57 Wn 2d lxii, R. 46-47, App. iv. This record includes a transcript of the testimony and the exhibits. Each member of the Board reads the entire record. When this is done, the Board in meeting makes its findings of fact, conclusions and its recommendation of disposition. Rule VIII, D, 57 Wn 2d lxii, R. 46-47, App. iv.

The entire record is sent to the Supreme Court, with the Board's findings, conclusions and recommendation. Rule VIII, D, 57 Wn 2d lxiii, R. 47, App. v. After briefs are filed, argument to the court is received. Rule IX, 57, Wn 2d lxiv, R. 47, App. vi.

The Supreme Court makes its own findings of fact.

> "Although the findings of the hearing panel and the Board of Governors are entitled to due weight, we are not bound by them since the power over disciplinary proceedings is vested solely in this court. In re Simmons, 59 Wn (2d) 689, 369 P. (2d) 947 (1962) and cases cited therein."
> In re Caffrey (1963) 63 Wn 2d 1, at 4, 385 P. (2d) 383.

RULES OF PROCEDURE

SUMMARY OF ARGUMENT

I. The complaint does not state a claim for which relief may be granted.

Although appellant's complaint characterizes, as violative of his constitutional rights, the factual situations he describes in his complaint, the facts he sets up show that his complaint is not that his constitutional rights are violated, but only that he disagrees with the state Supreme Court as to its conclusions drawn from the facts, and as to its interpretation of rules.

II. The United States District Court is without jurisdiction.

1) The Washington State Bar Association is not a "person" within the meaning of Sec. 1983, Tit. 42, U.S.C.A., on which appellant relies;
2) Appeal is the only remedy for errors such as those which he asserts;
3) The Association is immune from such a suit as appellant's, because it acted in a quasi-judicial capacity;

4) The practice of law is not a right guaranteed by the U. S. Constitution.

III. The authorities cited by appellant do not sustain the jurisdiction of the court.

ARGUMENT IN SUPPORT OF THE ORDER OF DISMISSAL

The Complaint Does Not State a Claim For Which Relief Can Be Granted

The decision of the Supreme Court in Mr. Clark's case is referred to in his complaint, and is part of the record here. R. 18 to 22. It will be clarifying to set out here the statement the court which epitomized the grounds for Mr. Clark's disbarment:

> "With reference to count 1, while acting in his fiduciary capacity as attorney for his client, (Della J. Harper), who was 95 years of age and incompetent to transact business, Neal Clark, being aware of these facts, took from her a deed to her residence property, in consideration of his promise to provide for her as Fred Schmidt had previously done, and to furnish burial in conformity with her station in life. From the inception of this agreement, he successfully made her dependent upon public assistance, in total disregard of his contract to provide for her from his personal funds. None of his resources were expended for the care, support or burial of Della J. Harper. * * * *

CLAIM NOT STATED

> "With reference to Count 2, Neal Clark knowingly falsified the applications for public assistance, when he stated that Della J. Harper was an indigent person. When the November 4th application was made, Fred Schmidt, although in a hospital, was still obligated to support her, and, when the December 4th application was made, Clark had obligated himself to continue Schmidt's previous agreement. The fact that he later inventoried the residence property in the guardianship estate did not correct the false statements in the applications for public assistance. As a matter of fact, he recorded the deed and wrongfully contended that the consideration had been paid in full. * * * *"

In re Clark, (1962) 61 Wn 2d 547, at 554, 555.

(It is practically made "mandatory" by the complaint that in considering it the court examine, even on motion to dismiss, the opinion of the Supreme Court. Emmons v. Smitt, 58 Fed. Supp. (1944) 869, at 872-783.)

The claim of lack of due process is the basis of appellant's complaint. He uses the term "lack of due process" repeatedly to characterize the various matters of which he complains. Examination of his allegations of fact demonstrates that the matters of which he complains are not lack of due process at all,

but are, instead, only his disagreement with the State Supreme Court as to the conclusions to be drawn from the facts, and its interpretation of rules. In short, his complaint is that the court made wrong decisions, not that there was lack of due process in reaching the decisions.

Appellant states that the two items on which he was disbarred came from a petition and letter from a hostile, opposing attorney, and that there was no prior interview of appellant before the disciplinary complaint was filed, and no pre-trial administrative hearing, and that this is lack of due process. R. 5, lines 16 to 28. He cites no authority or rule which requires such an interview or pre-trial hearing, and in his brief he concedes the formal complaint on which the panel hearing proceeded met the requirement of due process.

> "B. No element of due process of law attached to the Association's proceedings herein, except service of an involved complaint."
> Brief, page 9.

CLAIM NOT STATED

Appellant also asserts that it was denial of due process to place in evidence the oral decision of a Superior Court judge in the trial of a civil suit which involved his acts under consideration in the disciplinary proceeding; (R. 6, lines 8 to 16) and for the members of the hearing panel to have conducted continuous, hostile questioning of him (R. 7, lines 1 to 7). He does not assert that he made any objection to the evidence, nor to the questioning. For all that appears such procedure at the hearing met with his approval.

Appellant asserts as a further denial of due process,

> "Plaintiff's defense, and evidence in support thereof, to the complaint, were incorporated by the trial committee and Board of Governors into Findings 21 and 22, and Conclusions I and II, each recommending permanent disbarment, thereon." R 5, lines 29-31.

From this statement, it is apparent that a state of facts was developed from evidence introduced by appellant which was the basis of the findings and conclusions he mentions. Having been introduced by him, there can be no error in the panel's and the

and the Board's giving it consideration. In fact, error might have been claimed if he had not been allowed to introduce the evidence. Moreover, it is not claimed that these particular findings and conclusions were referred to by the Supreme Court.

The complaint asserts as further lack of due process that he was denied the right to have Donna Teal testify, not before the panel, but before the Board of Governors, after the matter had been submitted to the Board. R. 4, lines 11 to 22. The complaint states that Donna Teal was a housekeeper hired by him for the care of his client, Della Harper. The complaint does not state what her testimony would have been. Attached to the complaint, without identification, and without reference to it in the complaint, is his statement addressed to the Board. R. 10.

All that can be gathered from this statement is

1) Donna Teal was hired by appellant as a housekeeper for Della Harper. (COMMENT: This would necessarily be after appellant obtained the deed from Miss Harper.)

CLAIM NOT STATED

2) Donna Teal would testify that Josephine W. West was closeted with Miss Harper. (COMMENT: This means only that Miss West went into the room where Miss Harper was bedridden, and closed the door. Nothing that these women did then could be an excuse for Mr. Clark's prior act in taking Miss Harper's deed.)

3) Miss West tried to have Miss Harper execute legal documents. (COMMENT: What appellant's proof would show as to the nature of these documents, whether they would have been favorable or inimical to appellant is not stated.

It is apparent from the statement that the testimony of Donna Teal would have been immaterial. Before the Board of Governors should be asked to assemble and listen to her testimony, with the attendant expense of the hearing and supplemental transcript of the evidence, a showing should have been made that her testimony would be material. Besides, the request for a hearing does not comply with the rule. (Ante, p. 9.)

CLAIM NOT STATED

His further claim is that it was denial of due process for the court to fail to accord him his right to compensation for the work he had done in the probate proceedings involved before his removal as attorney for the personal representative. R. 7, lines 8 to 21. This, again, is not a statement of a denial of due process, but simply a claim of an erroneous decision by the Supreme Court which it had jurisdiction to make.

As to the third item, the one that was dismissed, appellant asserts it was lack of due process to refuse to hear the testimony of Ruth Meacham. He states he informed the panel she was in Bakersfield, California, and was "reluctant to testify," (R. 4, lines 6 to 9) and requested a continuance so he could produce her. R. 3, line 12. Later, he says, he petitioned the Board to hear her testimony, and filed her "court reported testimony." R. 3, lines 15 to 31.

There are two answers to his claim of want of due process: First, if it was error, it was without prejudice, because this item was recommended for

CLAIM NOT STATED

dismissal by the Board, and it was dismissed by the Supreme Court; Second, the complaint states that appellant filed "the court reported testimony of Ruth Meacham in California, which completely exonerated plaintiff of any conspiracy, or complicity, or wrongdoing." R. 3, lines 18 to 21. The findings and recommendation of the Board and of the Supreme Court, did the same thing,--exonerated him from blame as to this item. Hearing Ruth Meacham state orally that which she stated in the "court reported testimony" could add nothing. The result would have been the same.

Appellant also asserts that he was denied equal protection of the law and due process was violated because the record as to the third item was sent to the Supreme Court. R. 4, lines 30-31, and R. 5, line 1, and R. 6, lines 21 to 31. He says that this is contrary to Rule VIII D of the rules of discipline. The rule does not support his claim; it is:

CLAIM NOT STATED

> "If the formal complaint is dismissed or if there is no recommendation of discipline by the Board . . . the record of the proceeding shall be retained in the office of the Association . . . ." Rule VIII, D, 57 Wn 2d lxii; R. 47; App. v.

It is only when the formal complaint as a whole is dismissed, not merely a portion of it, or when no discipline at all is recommended, that the record of the proceedings are to be kept in the Bar Association office.

It is submitted the complaint does not state a claim upon which relief can be granted. Characterizations and labels, even though often repeated, do not state a claim when they are contradicted by the facts alleged.

> "We adopt the reasoning in Bottone v. Lindsley, 170 F 2d 705 (10th Cir. 1948) cert. denied, 336 U.S. 944, 69 S. Ct. 810, 93 L. ed. 1101 (1948), where the court said:

> "'(T)o make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision. "The Fourteenth Amendment did not alter the basic relations between the States and the national government." * * * Nor does it "assure uniformity of decisions or immunity from merely erroneous action."'"
>
> Sarelas v. Sheehan, (1963) 7th C.A. 326 Fed. 2d 490, at 491.

THE U. S. DISTRICT COURT LACKED JURISDICTION

Appellant asserts the jurisdiction of the District Court comes from the third paragraph of Section 1343 of Title 28, U. S. C., and Section 1983 of Title 42, U.S.C. R. 1 Brief, p. 1.

The third section of 1343 is:

"1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE.
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of

citizens or of all persons within the jurisdiction of the United States; (Underscoring supplied.)

> "June 25, 1948, c. 646, 62 Stat. 932;
> Sept. 3, 1954, c. 1263, Sec. 42, 68 Stat. 1241
> Sept. 9, 1957, Pub. L. 85-315, Part III,
> Sec. 121, 71 Stat. 637."

It is apparent from inspection that Section 1383 Title 28 does not give a right of action. It provides a forum when a cause of action exists. To establish that a cause of action exists, it is necessary to look elsewhere.

That this is true appears more definitely from examination of the historical background of Section 1383. It was preceded by the statute of March 3, 1911, 36 Stat. 1087, 1092.

Chapter One of the statute of March 3, 1911, 36 Stat. 1087 to 1090 deals in 23 Sections with the organization of U. S. District Courts. Chapter two deals with the jurisdiction of the District Courts. The first section, numbered 24, deals with their original jurisdiction. It begins: "Sec. 24. The district courts shall have original jurisdiction as follows:" Then follow 25 subparagraphs.

STATUTES

The Fourteenth subparagraph is as follows:

> "Sec. 24. ORIGINAL JURISDICTION. The District courts shall have original jurisdiction as follows: * * * * *
>
> " Fourteenth: Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, or any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." 36 Stat. at 1092.
> (Underscoring supplied.)

This fourteenth subparagraph and two others, the twelfth and thirteenth, are the only subparagraphs in which the prase "authorized by law" occurs. The other subparagraphs patently refer to matters within federal jurisdiction, for instance, laws relating to internal revenue, arising under postal laws, patents, and so on.

The statute of 1948, 62 Stat. 932, combines, with some change in phraseology, but not in meaning, the twelfth, thirteenth and fourteenth subparagraphs of Sec. 24, of the Act of March 3, 1911, into one section with the catch title, "Civil Rights."

STATUTES

Section 1343, Title 28 U.S.C. is the same as the statute of 1948, 62 Stat. 932, with the exception of changes made in 1954 and 1957. The changes made in 1954 were in the first two paragraphs of Section 1383; there was no change made in the third paragraph. 68 Stat. 1341. The changes made in 1957 were to add a fourth paragraph relating to elections, and to change the catch title to "Civil Rights and Elective Franchise." 71 Stat. 637.

There has been no change in phraseology of the third paragraph of Section 1383 since 1948, and none in substance since 1911.

Although not quoted in appellant's brief, Section 1983 of Title 42 U.S.C. is cited in it and in his complaint. For reasons stated hereafter, that section does not afford appellant a cause of action,---"a civil action authorized by law." Section 1983 is:

STATUTES

> "1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS.
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

THE WASHINGTON STATE BAR ASSOCIATION IS NOT A "PERSON" WITHIN THE MEANING OF SEC. 1983

In holding that Kittitas County, Washington, is not a "person" within the meaning of Section 1983, this court said:

> "Congress did not undertake to bring municipal corporations within the ambit of 42 U.S.C. Sec. 1983. Monroe v. Pape, 365 U.S. 167 (in which the statute is designated as R.S. Sec. 1979). The considerations which have led to this conclusion, based largely upon an examination of the legislative history, indicate that this is likewise true of a state or county.

NOT A PERSON

See the legislative history reviewed in <u>Monroe v. Pape</u>, pages 188-191 of 365 U. S. pp. 484-486 of 81 S. Ct. It follows that the action was properly dismissed as to defendant Kittitas County."

<u>Sires v. Cole,</u> (1963) 9 C.A. 320 Fed. 2d 877.

APPEAL IS THE ONLY REMEDY

Federal court decisions from 1857 to 1962 are that for errors denying constitutional rights in state court proceedings the remedy of the aggrieved is by appeal, and not by suit in the District Court.

David Secomb was disbarred by the Supreme Court of the Territory of Minnesota, without notice, and without a hearing. He petitioned the U. S. Supreme Court to order the Minnesota court to vacate the order of disbarment. The court through Chief Justice Taney, said:

> "It is not necessary to inquire whether this decision of the Territorial court can be reviewed here in any other form of proceeding.

> But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate be issued, commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be. And we are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion."
>
> Ex parte Secombe (1857) 60 U.S. (19 How.) 9 (at 15) 15 L. ed. 565.

In Selling v. Radford, in which the U.S. Supreme Court gave consideration to the procedure to be followed in determining whether a lawyer disbarred by a state should continue as a member of the bar of the U. S. Supreme Court, the court said:

> " . . . we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the bar of the courts of that state for personal and professional misconduct."
>
> Selling v. Radford (1917) 243 U. S. 46.

APPEAL ONLY REMEDY

Wm. V. Rooker petitioned the U. S. District Court to declare void a judgment of the Supreme Court of a state because his constitutional rights were violated. In affirming the dismissal of the action because of lack of jurisdiction, the U. S. Supreme Court said:

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. (Citing cases) Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. (Citing authority.) To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."
>
> Rooker v. Fidelity Trust Co. (1923)
> 263 U. S. 413.

John E. Gately sued six judges of the Supreme Court of Colorado in the U. S. District Court relying on Section 1983 of Title 42 U.S.C. He asked that the

APPEAL ONLY REMEDY

District Court order the Supreme Court of Colorado to set aside the disbarment and to award him damages. In sustaining an order of dismissal on the ground that the District Court was without jurisdiction, the Circuit Court said:

> "The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct. (Citing a Colorado statute.) The Federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. (Citing cases.) In Theard v. United States, 354 U.S. 278, 281, 77 S. Ct. 1274, 1276, 1 L. ed 2d 1342, the Supreme Court said:
>
> > 'It is not for this court, except within the narrow limits for review open to this court, as recently canvassed in Konigsberg v. California 353 U. S. 252, (77 S. Ct. 722, 1 L. ed 2d 810), and Schware v. Board of Bar Examiners, 353 U.S. 232 (77 S. Ct. 752, 1 L. ed. 2d 796), to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. * * * *'

APPEAL ONLY REMEDY

> The limits of review referred to are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the fourteenth amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had."
>
> Gately v. Sutton, et al. 10 C.A. (1962)
> 310 Fed 2d 107

THE WASHINGTON STATE BAR ASSOCIATION IS IMMUNE FROM THIS CHARACTER OF ACTION

It is apparent from Appellant's complaint that the actions of which he complains were carried out by the Association as a judicial function, similar to that of a master in chancery, as an aid to the Supreme Court. In fact, the Association is powerless to vacate the order of disbarment, as asked by Mr. Clark's complaint. Its only function was one of recommendation in the first place. For its acts in a judicial capacity the Association is immune from suit, even under 1983 of Title 42.

Richard A. Sires sued the prosecuting attorney and his deputy, and the trial judge for damages because he was imprisoned, under sentence, for

longer than was authorized by law. In sustaining the dismissal of the action, this court said:

> "Judges are immune from suit arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and notwithstanding such acts may have been performed in excess of jurisdiction, provided there was not a clear absence of all jurisdiction over the subject matter. (Citing cases) * * * *
>
> "The remaining defendants are the prosecuting attorney and a deputy prosecuting attorney of Kittitas County. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge."

Sires v. Cole, (1963) 9 C.A. 320 Fed. 2d 877.

THE PRACTICE OF LAW IS NOT A PRIVILEGE GUARANTEED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES

The right to practice law in the state courts is a right granted by the state, not by the United States.

In Mitchell v. Greenough, 9 C.A. (1938) 100 Fed. 2d 184, at 185, this court said:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws."

RIGHT TO PRACTICE LAW
NOT GRANTED BY U. S.

In Emmons v. Smitt, 6 C.A. (1945) 149 Fed 2d 669, at 672, the court said:

> "We search in vain for a basis for jurisdiction of the District Court over plaintiff's action, in so far as it seeks to secure to him the right to practice his profession. The claim that it is found in subsection (14) of Sec. 41, 28 USCA.* (Suits to redress deprivation of civil rights) is without merit, since plaintiff's right to practice law is not secured to him by the Constitution nor by any law of the United States. It is not a property right but a privilege granted by the state of Michigan (citing cases.)
>
> Emmons v. Smitt, 6 C.A. (1945) 149 Fed. 669, at 670.

* Now Section 1983, Title 42.

Besides showing that the District Court is without jurisdiction, the foregoing analysis shows not only that the complaint does not state a claim for which relief can be granted, but, in addition, it shows that no amended complaint can state such a claim. This is for the reason that no amended complaint can state:

RIGHT TO PRACTICE LAW
NOT GRANTED BY U. S.

1) that the Association is a "person"

2) that appeal is not the only remedy for the faults he claims

3) that the Association is not immune from such a suit, or

4) that the right to practice law in a state court is a right or privilege guaranteed by the Constitution of the United States.

ARGUMENT IN ANSWER TO APPELLANT

The matters that appellant points out in argument do not differ from that which is stated in his complaint. Again he recites claimed errors in the disciplinary proceedings, which, even if true, would be no more than errors of decision, within the jurisdiction of the court, errors which can be questioned only on appeal, and not in an oblique attack in the U. S. District Court.

None of the cases cited by appellant support the jurisdiction of the District Court. Only one of them even involves the subject of jurisdiction.

ARGUMENT IN ANSWER

Six were U. S. Supreme Court citations, in which the proceeding reached that Court by certiorari to a state court. These are, alphabetically listed, Chambers v. Florida, Holt v. Virginia, Konigsberg v. California, Schware v. Board, Willner v. Committee, and Young v. Ragen.

Chambers v. Florida, 309 U. S. 227, 84 Law Ed. 716, (Appellant's brief, p. 12) involved the affirmance by the Supreme Court of Florida of a murder conviction and the admission of a confession in evidence. Holt v. Virginia (1965) 14 Law Ed. No. 3, p. 220, (Brief, p. 13-14) involved the propriety of the convictions of two lawyers for contempt on account of language used in asking for a change of venue. Konigsberg v. California, (1957) 353 U. S. 252, 77 S. Ct. 722 (Brief p. 9) and Schware v. Board, (1957) 353 U. S. 233, 77 S. Ct. 752 (Brief, pp. 9, 11, 13) and Willner v. Committee on Character and Fitness (Brief, pp. 7, 9, 12) involved the correctness of the decisions of the Supreme Courts of California, New Mexico, and New York, respectively, which denied

[illegible] In a [illegible]

[illegible]

applicants admission to the bar. Young v. Ragen, 337 U. S. 235, 93 Law Ed. 1333, 695 S. Ct. 1073, presented the correctness of the decision of the Circuit Court of Randolph County, Illinois, which denied a petition for habeas corpus without a hearing.

In two cases cited certiorari was granted by the U. S. Supreme Court to a U. S. Court of Appeals. They are Greene v. McElroy and Theard v. U. S. Greene v. McElroy, (1959) 360 U. S. 474, 79 S. Ct. 1400 (Brief p. 9) came to the U. S. Supreme Court by certiorari to the U. S. Court of Appeals for the District of Columbia. Greene had sued in the U. S. District Court for the District of Columbia to have his security clearance restored. The decision of that court had been appealed to the Court of Appeals. In Theard v. U. S., 354 U. S. (1957) 278, 77 S. Ct. 1274 (Brief, pp. 7, 9, 15) certiorari was granted to the Court of Appeals for the 5th Circuit, which had affirmed the decision of the U. S. District Court for the Eastern District of Louisiana striking Theard's name from the rolls of the attorneys admitted

to practice before the U. S. District Court, on the basis of his disbarment by the Louisiana Supreme Court, without a hearing in the U. S. District Court as to the correctness of the state court's decision.

Gray v. Wilson (Nor. Dist. Cal., 1964) 230 Fed. Supp. 860, cited on page 9 of appellant's brief, is the decision of the U. S. District Court on habeas corpus that Gray was improperly convicted in the state court of assault with a deadly weapon, because no witness testified against him at the trial and the case was presented, without his consent, only on a transcript of testimony taken at a preliminary hearing, and, without his consent, to a judge without a jury.

In Ex Parte Wall (1883) 107 U. S. 265 (Brief, p. 9) a petition was presented to the U. S. Supreme Court by Wall for mandamus to the U. S. District Court for the southern district of Florida to vacate the order of the latter court as a lawyer disbarring Wall in that court. Wall had been disbarred because the District Judge found that he had been a member of a lynching party.

Re Fletcher, (1955) 221 Fed. 2d 477, 4th C. A. cited at page 8 of appellant's brief, involved this situation: Fletcher had been disbarred by the Court of the District of Columbia. For that reason the U. S. District Court for the Eastern District of Virginia disbarred him in that court. The case reached the Fourth Circuit by appeal.

Selling v. Radford (19616) 243 U. S. 26, 37 S. Ct. 377, cited at page 8 of appellant's brief, came to the Supreme Court by petition that Radford be disbarred in that court because he had been disbarred in a state court; an order was issued to Radford that he show cause why he should not be disbarred in the U. S. Supreme Court. The cited decision gives the court's reasons for doing so.

The decision in Bradley v. Fisher, 80 U. S. (13 Wall.) 355, 20 Law Ed. 646, cited on pages 9 and 15 of appellant's brief, was on a writ of error to the Supreme Court of the District of Columbia. Fisher, a judge of Supreme Court of the District of Columbia had previously stricken Bradley's name from

the roll of attorneys, and the U. S. Supreme Court had ordered his name restored to the roll. Bradley sued Fisher for damages. It was in holding that the Judge was immune from such a suit that the court made the passing comment quoted on page 15 of appellant's brief.

Sarelas v. Sheehan, (1963) 326 Fed. 2d 490, 7th C. A., cited on pages 9 and 13 of appellant's brief, is the only case cited which involves jurisdiction. Sarelas sued Sheehan in the U. S. District Court, claiming that as a deposition officer appointed by the Circuit Court of Cook County, Illinois, Sheehan had acted in violation of his duties. The District Court dismissed the action, on the ground that Sheehan was immune as an officer performing a quasi-judicial function. The 7th Court of Appeals said:

> "Although we could base our decision on the ground of judicial immunity, it is unnecessary to reach that question. Another reason even more fundamental than the doctrine of immunity prevents plaintiff from pursuing his action. A claim under the Civil Rights Act requires that a plaintiff show deprivation

of his constitutional rights. In the instant action plaintiff alleges no deprivation of such rights.

"Plaintiff has alleged in his complaint that irregularities may have occurred during the course of the state court litigation. There is no suggestion that the deposition proceeding was a sham or contrivance. If defendant's actions as the deposition officer were inconsistent with the laws of the State of Illinois, plaintiff's recourse was to complain to the court that appointed the defendant, and if necessary, pursue his complaint in the appellate courts of Illinois.

"The events that gave rise to plaintiff's 'rights' on which he bases his action, are not of constitutional stature, vindicable under the Civil Rights statutes. Constitutional due process and equal protection of the laws have a more fundamental meaning than plaintiff ascribes to them in this action. Mere errors and irregularities occurring in a judicial proceeding must be differentiated from a situation where the proceeding itself is a sham or nullity."

(Then follows the language quoted above on page 21.)

Sarelas v. Sheehan, (1963) 7th C.A. 326 Fed 2d 490, 491.

It is respectfully submitted the order dismissing appellant's action should be affirmed.

T. M. Royce
Attorney for the
Washington State Bar Association

February 8, 1966

APPENDIX

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STATE BAR ACT

"OBJECTS AND POWERS. There is hereby created as an agency of the state, for the purpose and with the powers hereinafter set forth, an association to be known as the Washington State Bar Association, hereinafter designated as the state bar, which association shall have a common seal and may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said association, enter into contracts and acquire, hold, encumber and dispose of such real and personal property as is necessary thereto."
RCW 2.48.010, Laws 1933, ch. 94, sec. 2, page 397.

"BOARD OF GOVERNORS. There is hereby constituted a board of governors of the state bar, which shall consist of the president of the state bar, as an ex-officio member, and of one member elected by secret ballot by mail by the active members residing in each congressional district now or hereafter existing in the state . . . ."
RCW 2.48.030, Laws 1933, ch. 94, sec. 5, page 398.

"STATE BAR GOVERNED BY BOARD OF GOVERNORS. The state bar shall be governed by the board of governors which shall be charged with the executive functions of the state bar and the enforcement of the provisions of RCW 2.48.010 through 2.48.180 (the State Bar Act) and all rules adopted in pursuance thereof. . . ."
RCW 2.48.040, Laws 1933, ch. 94, sec. 6, page 398.

"NEW MEMBERS. After the organization of the state bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of RCW 2.48.010 and through 2.48.180, (the State Bar Act), except judges of courts of record, shall become by that fact active members of the state bar."
RCW 2.48.021, Laws 1933, ch. 94, sec. 4, page 398.

"ADMISSION AND DISBARMENT. The said board of governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; and, with such approval, to establish from time to time and enforce rules of professional conduct for all members of the state bar; and, with such approval, to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules: Provided, however, that no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same."
RCW 2.48.060; Laws 1933, ch. 94, sec. 8, page 399.

RULES OF DISCIPLINE
Adopted by the Supreme Court of Washington.
Effective January 2, 1961

Rule V, C.

"HEARING PANEL. Each disciplinary matter referred for hearing shall be heard by a three-member Hearing Panel appointed by the President of the Association at the time he signs the formal complaint. The Panel shall be composed of one member from the Board and two members from the Local Trial Committee of the county or district where the respondent attorney had his residence at the time of the alleged violation of the rules of professional conduct."

57 Wn 2d li, R. 38.

Rule VIII, I

". . . Witnesses shall testify under oath administered by the chairman of the Panel."

57 Wn 2d lvii, R. 43.

Rule V, D

"DUTIES. * * * The Panel shall make its findings, conclusions and recommendation, submitting them to the Board together with all pleadings, documents and exhibits within 15 days from the date the taking of evidence is concluded."

57 Wn 2d lii, R. 39.

Rule VIII, A

"NOTICES. When the findings, conclusions and recommendation of a Panel are filed in the office of the Association, a copy thereof and a notice of filing with a copy of Rule VIII shall be served upon the respondent attorney or his counsel"

57 Wn 2d lxi, R. 45.

Rule VIII, B

"STATEMENT IN SUPPORT OR OPPOSITION. At any time within twenty days after the service of the abovementioned notice the State Bar Counsel and the respondent attorney shall have the right to file with the Board a typewritten statement in support of or in opposition to the findings, conclusions and recommendation of the Panel, setting forth facts, alleged errors of law or any other matter in support of such statement. A copy of such statement, when filed, shall be served on the respondent attorney or his counsel, or State Bar Counsel, as the case may be."

57 Wn 2d lxi, R. 46.

Rule VIII, C.

"ADDITIONAL HEARING. In making the above statement in support of or in opposition to the findings, conclusions and recommendation of the Panel, State Bar Counsel or the respondent attorney may request an additional hearing before the Panel based on the ground of additional evidence; provided, however, that such statement shall contain a complete outline of such additional evidence and shall set forth the reasons why the same was not presented at the hearing, all supported by affidavit or affidavits. Such request may be granted or denied in the discretion of the Board."

57 Wn 2d lxi, R. 46.

Rule VIII, D.

"BOARD REVIEW. Each proceeding in which a hearing has occurred shall be reviewed by the Board upon the record made and filed in the office of the Association, together with the statements in support of or in opposition to such findings, conclusions and recommendation as provided by Rule VIII, B and C. Neither State Bar Counsel nor the respondent attorney shall be entitled to be heard orally in such review, unless otherwise ordered by the Board."

57 Wn 2d lxii, R. 46.

Rule VIII, D

" * * * Prompt decision of the Board upon such review shall be made. The Board shall make findings, conclusions and its recommendation as to whether the formal complaint shall be dismissed, or there shall be no discipline, or the respondent attorney shall be censured, reprimanded, suspended or disbarred, and a copy thereof shall be served on the respondent attorney. If requested in writing by the person complaining against the respondent attorney, the recommendation of the Board shall be furnished to such person.

If the formal complaint is dismissed or if there is no recommendation of discipline by the Board or if the recommendation is that the respondent attorney be censured or reprimanded and the censure or reprimand is accepted by the respondent attorney, the record of the proceeding shall be retained in the office of the Association, with notice thereof sent to the Supreme Court, which notice shall remain confidential, and such censure or reprimand shall be given privately by the board; provided, however, if the respondent attorney has a previous reprimand on his record, the current reprimand may be published in full in the next issue of the Washington State Bar News.

If the recommendation of the Board is that the respondent attorney be censured or reprimanded and such recommendation is not accepted by the respondent attorney, or if the recommendation is that the respondent attorney be suspended or disbarred, the record shall be transmitted to the Supreme Court.

If any member or members of the Board shall dissent from the findings, conclusions or recommendation of the majority of the Board, he or they shall state briefly his or their reasons therefor, and a copy shall be served upon the respondent attorney or his counsel. Such dissent or dissents shall be a part of the record.

The member of the Board who shall have served on the Panel shall not participate in the review.

No suspension or disbarment shall be recommended by the Board unless and until a transcript of the testimony before the Panel shall have been reduced to writing and settled as in this rule provided, and circulated to each member of the Board."

57 Wn 2d lxii, R. 46-47.

Rule IX

"* * * At the termination of the twenty days, (for filing a reply brief) the clerk of the Supreme Court shall enter the cause upon the docket of the court for hearing on any day occurring not less than ten days thereafter and shall notify by mail the respondent attorney and State Bar Counsel of the time fixed for such hearing. The cause may be submitted on briefs or with oral argument. Each party shall have one-half hour for argument."

57 Wn 2d lxiv, R. 47.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

T. M. Royce

T. M. ROYCE
Attorney for the
Washington State Bar Association